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SIR JOHN BEAUMONT ON THE INDIAN JUDICIAL SYSTEM.

Sir John Beaumont, the Chief Justice of the Bombay High Court, retired in 1943. He has lost no time in offering his criticism of the Indian judicial system. The full report of his speech will in time appear in the Asiatic Review and will, We hope, be reproduced in the Press. But in the meanwhile, we cannot refrain from making our comments on his proposals. Sir John characterised the control of the executive over the magistracy as "thoroughly vicious". He has been reported as saying:

"I am afraid when the Congress party was in power, it was as anxious to control magistrates as its predecessors had been, and would have extended control to the judges if it had had the chance. At any rate whatever the reasons may have been, the Congress Governments made no real attempt to effect the reform and from the unanimity with which the Congress Governments abandoned the project, I think one may assume they acted on the orders of the Working Committee—that irresponsible and autocratic body working in the back-ground outside the constitution—whose activities played such a sinister part in destroying all semblance of real democratic government in the Provinces wherein the Congress party was in power. For much of the work of the Bombay Congress Government, I had sincere admiration and my relations with the ministers concerned with Law and Order were mostly friendly, but I regarded the failure to tackle the problem of the magistracy as a cynical sacrifice of principle to expediency".

We cannot be sure of the responsibility of any outside Congress agency for this failure of the Congress Governments to tackle this question. But we are aware that the Madras Premier expressed himself against the separation of the executive and the judiciary and wrote to the Premier of the Central Provinces warning him against accepting it in his Province. These are the words of his letter, quoted from "The Hitavada", Nagpur, of February 26, 1941.

"Though I have no time to write any decent letter to you, I must hurry to warn you against accepting policy of separating the executive from the judiciary which, due to old ideas, some of our party members still think is good politics. Dividing the executive from the judiciary will take away whatever limited power we have secured for the people. The judiciary will become the stronghold just as the executive was before (*sic*) foreign domination. I have turned it down in this Province and my party has understood and appreciated the reason. Apart from what is stated above, there will be conflicts if not deadlocks".

This journal has naught to do with politics. And whoever ultimately might have been responsible for this view of the Madras Premier, we think that the view was wholly wrong. The Congress has throughout its long history agitated for the separation of the executive from the judiciary, in that respect voicing the public opinion of the country as a whole. At all the Conferences of lawyers including the one recently held at Kumbakonam, the separation has been uniformly demanded. It is difficult to understand the claim that the power of the executive over the magistracy is a power obtained *for the*

people, or the statement that his party understood and appreciated the reason. If we refer to these matters in this connection it is not with a desire to raise any political controversy over it. It is only to point out that a reform so obviously necessary and so uniformly supported, and so wholly desirable in itself, has the insuperable difficulty of everyone for the time being in power insisting upon its rejection so long as he is in power. The Government of the day do not want it; the Congress Government in Madras did not want it and commended the same attitude to the Central Provinces. If the matter received attention as the result of Sir John's strong strictures on the present system he will have the credit of having achieved this much-needed reform in the Indian judicial administration.

Connected with this is the other recommendation of Sir John Beaumont that the recruiting for the judiciary should be in the hands of the High Court and not in the hands of the Public Services Commission. In the Lawyers' Conference at Kumbakonam the same recommendation was made. We are aware that even before the Government of India Act of 1935, there was no uniform system of recruitment. In Madras the recruitment was made by the High Court for the munsif's place. In Bombay the Government made the appointment of subordinate judges. The old Madras practice of the High Court recruiting for the subordinate judicial service is the most satisfactory arrangement and that should be restored.

A third matter that Sir John notices is the recruitment for the judiciary from the ranks of I.C.S. men. Sir John recommends its discontinuance. It *is* time that it was discontinued. At one time the barrister element on the High Court required to be helped in judicial administration by those who had previous knowledge of the country. It was then thought that a number of I.C.S. men should be appointed to the High Court. The rule that one-third of the judges of the High Court should be barristers and one-third should be I.C.S. men had its origin in this desire to combine knowledge of law with knowledge of Indian conditions for the due administration of justice. That rule has now been abolished very properly, because knowledge of Indian conditions is plentifully available among the members of the legal profession in India from whom recruitment can be and is being made. It is no longer necessary to appoint I.C.S. men for the object for which they were originally appointed to the High Courts. It is but right that the judicial administration should be in the hands of a judiciary composed of members trained in the legal profession. And I.C.S. men should be confined to the executive department of the government.

On these three matters Sir John is right in our opinion and his recommendations should be carried out at the earliest opportunity. The recruitment of the judiciary by the High Court may easily be restored. Recruitment of I.C.S. men to the judiciary and their appointment to the High Court Bench may well cease for the future. The separation of the judiciary from the executive may perhaps have to wait till after the war.

On one matter we do not agree with Sir John. We do not think that the Federal Court was established prematurely. The legislative power having been distributed between the Provincial and Federal legislatures, a Federal Court was necessary to keep them within the limits of their legislative power. To leave it to the High Court and to the Judicial Committee without a Federal Court to deal with these constitutional questions is at the least unusual. We agree however that the Federal Court should be constituted the Supreme Court for India dealing finally and exclusively with all appeals from the High Courts in India. The only objection that was recently taken was to the option given to the parties in the matter of appeals, to choose between the Federal Court and the Privy Council.

T. R. V. SASTRI

A NOTE ON SECTION 44-B OF THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT

BY

B. Varadarajulu Chettiar, B.A., B.L., Official Receiver, Coimbatore.

Section 44-B which was inserted by Act XI of 1934 has given rise to much litigation. To appreciate the real difficulty it is necessary to examine the provisions of the newly added section which runs:—

"44-B. (1) Any exchange, gift, sale or mortgage and lease for a term exceeding five years of the whole or any portion of any inam granted for the performance of a charity or service connected with a math or temple shall be null and void."

The words "inam granted for the performance of a charity or service connected with a Math or Temple" as well as the last portion dealing with the consequence, *viz.*, "shall be null and void" should be noted.

On a first reading of the section one is faced with questions, such as, whether it has got retrospective effect; whether it can take away rights already accrued under the enactments, say, for instance, the Indian Limitation Act, etc.

There is nothing in the Act itself to solve the question whether the section is retrospective in character. One has therefore to turn to the principles governing the interpretation of statutes. It is a well established principle of law that any new amendment cannot have a retrospective effect so as to take away vested interests or rights which have already accrued under the existing law unless the same has been specifically so declared. Any statute which takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes new duties or attaches new disabilities, must be presumed (out of respect for the legislature) not to have retrospective operation. No doubt there are exceptions like declaratory statutes passed to remedy defects in form. But an amending act is more than a declaratory statute and cannot be taken to be retrospective in character.

On a reading of the section, one is led to think that it affects only future alienations. No doubt it is likely to be contended that the intention of the legislature in introducing the section is to protect the temple properties from alienations already made, and if it is held to apply only to future transfers the very object of the Act will be defeated. Whatever be the intention of the legislature it is the duty of the Court to administer the law as it stands according to the plain words and it is for the legislature to rectify the defect by suitable amendments to give effect to the real object or intention. In this connection the amendment to section 3 of the Transfer of Property Act by Act X of 1927, dealing with "attestation" may well serve as a pointer. There the intention of the legislature was to give a retrospective character to the Amending Act and so the words "and shall be deemed always to have meant" were introduced. Such words being absent in the section under discussion it cannot safely be contended that it is intended to be retrospective. Under the law as it existed prior to the amendment, if a provision had been made for the due performance of charity or service by reserving the *tharam* or *thirva* when transfers were made of the inam property, it was deemed to be not an alienation to be questioned. Board's Standing Order No. 54 is in point. However, one finds that various transfers, even if provisions are made for the performance of charity or service, are being nullified by proceedings before the Revenue authorities by applications under section 44-B and the transferees, even when they are *bona fide*, are left without remedy. As has already been suggested if one takes the section as having a retrospective effect it is likely to create

complications in respect of rights accrued under the Indian Limitation Act, which being a piece of Central Legislation, cannot be infringed by the Act of a Provincial Legislature.

There is a more important question namely to what class or classes of inams does the amendment apply. There are various classes including grants in which the deity is the grantee, or the archaka doing service to the temple, and grants for other services. In construing the nature and class of grants difficulties have arisen and decisions of Courts are not uniform. A recent decision of our High Court (not reported) of Leach, C.J., and Lakshmana Rao, J., in A.S. No. 198 of 1940, *Kothukara Chennimalai and others* v. *Lakshmideviammal,* has laid down that section 44-B is applicable only to service inams and not to devadayam inams or grants in favour of the deity since deities are not under service to any one. At the same time their Lordships clearly emphasise that the rights of the trustees of the temple to question the unauthorised alienations in the ordinary Civil Courts is not in any way affected by the proceedings before the Revenue authorities. The effect of the decision is that the section is inapplicable to grants in favour of deities and consequently the Collector has no jurisdiction under section 44-B to resume the inam from the alienee.

Again to find out whether a particular grant is in favour of a deity or archaka is not free from difficulty. A reference to the decisions in *Swamy Iyengar and others* v. *Venkataramana Iyengar and another*[1] and *The President of Commissioners for the Hindu Religious Endowments, Madras and others* v. *Thadikonda Koteeswara Rao and others*[2] may be made. What then is the remedy of an alienee of an inam, even assuming that the grant is in favour of the deity when the Revenue authorities have resumed the grant under section 44-B? The Act provides that the order of the Collector is final subject to the result of any suit instituted in the Civil Court for determining whether the inam comprises both melvaram and kudivaram or only the melvaram. Excepting this, an order of resumption shall not be liable to be questioned in any Court or otherwise. The remedy always lies under the general law. Whether the objection is to the jurisdiction or goes to the root of the matter, an action will certainly lie in a Civil Court. Any statutory body getting power under statutory authority exceeding the authority given by the statute can be questioned in the Civil Courts since such action is *ultra vires.*

The High Court, in a recent case, S. A. No. 1401 of 1941, *Kandasamy Pillay* v. *Muthukomarandy,* has held that the act of resumption was done on behalf of the Government and the Government must be made a party to the suit and that in the absence of the Government the resumption cannot be set aside.

Thus the amendment has given rise to various doubts and difficulties and it is time that legislature intervenes and makes the position clear.

SUMMARY OF ENGLISH CASES.

RICHES *v.* WESTMINSTER BANK, LTD., (1943) 2 All E.R. 725 (C.A.).

Practice—Interest not included in the statement of claim—Discretion of Court under section 3, Law Reforms (Miscellaneous Provisions) Act, 1934, to award interest.

A Judge has under section 3 of the Law Reforms (Miscellaneous Provisions) Act, 1934 an unfettered discretion to award interest even where no claim for interest has been made

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2. (1937) 2 M.L.J. 413.

1. A.I.R. 1934. Mad. 381.

in the pleading. Though it is not necessary it may be advantageous that the point should be raised in the statement of the claim.

WESTERN SCOTTISH MOTOR TRACTION CO., LTD. *v.* FERNE OR ALLAM AND OTHERS, (1943) 2 All E.R. 742 (H.L.).

Torts—Negligence—Omnibus driver—Driving round curve at excessive speed—Injury to standing passenger who had nothing to hold on causing death—Liability.

Where an omnibus was not provided with rails or straps for the purpose of enabling all standing passengers to steady themselves against a sudden sway and a standing passenger was fatally injured by reason of the omnibus being driven at an excessive speed around a curve, the driver cannot escape liability by saying that he was driving at a speed which was safe for passengers who were seated inside the bus or though standing were holding to some portion of the vehicle to steady themselves.

SUMMERS *v.* ROBERTS, (1943) 2 All E.R. 757 (K.B.D.).

Pharmacy Act (1941), section 12 (2)—Prohibition of sale of medicines "otherwise than in a shop"—Shop—Meaning—Temporary stall in market—If "shop" or not.

The appellant sold by retail at a stall—a plank or board placed upon two trestles—situate in the uncovered portion of the Leeds City Market some medicine. Under the Pharmacy Act, 1941, section 12 (2) it was an offence to sell by retail an article of the sort sold in this case unless the sale was effected at a shop. On a special case, *Held*: The words "premises where a retail trade is carried on" are not wide enough to make a place in no way limited or bounded by any ascertainable marks or fences, with no structure upon it except two trestles and a board, with no continuity or regularity except that business took place twice a week, a "shop" for the purposes of the Pharmacy Act.

HENDERSON *v.* HENDERSON, (1944) 1 All E.R. 44 (H.L.)

Husband and wife—Adultery committed by wife—Husband renewing co-habitation on promise by wife to be of good behaviour in future—Conclusiveness of condonation—Subsequent withdrawal of such promise by wife—Effect.

In a husband's petition for divorce it was found that after the wife had admitted to the husband her adultery, the husband told her that she must entirely break off all acquaintance with the co-respondent if the husband were to remain with her, and that she promised to do so. Thereupon the husband and wife went to bed together; he forgave his wife and had sexual relations with her that night at her suggestion. Early the next morning her attitude changed and she said she did not see why she should stop seeing the co-respondent, and that, if she denied the adultery, the co-respondent ought to do so too. Upon this the husband left the house and never lived with her again. On a question whether there was a condonation which will bar the husband's petition,

Held: There cannot be such a thing as contingent condonation by a husband of his wife's adultery—certainly not when the condonation includes the irrevocable act of sexual intercourse. Condonation cannot be treated as cancelled because an erring wife who makes promises as to her future conduct withdraws the promise later on. Condonation is not a contract in which one party may claim to be discharged by the other's repudiation. Condonation is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife deliberately misrepresenting her true state of mind. It is fraudulent misstatement of fact (as to the wife's state of mind), not assurances as to future conduct, which may remove the disabling consequences of condonation.

CADZOW COAL CO. LTD. *v.* PRICE, (1944) 1 All E.R. 54 (H.L.).

Workmen's Compensation—Accident arising out of employment—Burden and quantum of proof.

It is sufficient discharge of the workman's onus of proving that the accident arose out of his employment, if he shows that an accident of such a character as that which in fact occurred was one to which his occupation was specially exposed. He is not required to explain the cause of the accident and to show that he was not guilty of any serious and wilful misconduct.

Re PASCOE, (1914) 1 All E.R. 70 (Ch.D.).

Bankruptcy Act (1914), *section* 39—*Successive bankruptcies—After acquired property—Vests in trustee of first bankruptcy.*

P was adjudicated bankrupt on August 26, 1926, the Official Receiver being the trustee in bankruptcy. A dividend of 2*sh.* in the £ had been paid by December 22, 1933. No further dividend was paid and *P* never obtained his discharge. *P* subsequently went into business on his own account and by some means he had acquired a certain amount of cash by the month of March, 1942. In that month enquiries were started regarding his dealings with a company and he was ultimately arrested and on April 15, 1942, *B* to whom *P* had handed a sum of £2,000 to be held for *P*, came to know that *P* was an undischarged insolvent and handed over the money to the police inspector intimating the position. In the summer of 1942, £400 was paid out of this money to *P's* solicitors for the costs of the defence, with the leave of the judge. *P* was convicted and the judge ordered the balance of amount to be paid towards the costs of the prosecution which was accordingly paid to the county council. Meantime the Official Receiver wrote to the chief constable of the county council demanding the amount as after-acquired property of the bankrupt but in-spite of the notice the amount was paid over to the county council. On November 12, 1942, the county council presented a bankruptcy petition against *P*; a receiving order was made on December 16, 1942, and on December 18, 1942, he was adjudicated bankrupt for the second time. On January 6, 1943, *D* was appointed trustee in the second bankruptcy. *D* applied to the bankruptcy Court and claimed the amount which had been paid for costs of prosecution.

Held, that the title to the amount vested in the first trustee in bankruptcy when *P* acquired it and the passing of the money from *P* to *B* and from *B* to the police could not operate as a divesting.

JOTTINGS.

Amendments to the Madras Bar Council Rules.—With the previous sanction of the High Court of Judicature at Madras, the Bar Council has made the following amendments to the Madras Bar Council Rules framed under sections 9 and 15 of the Indian Bar Councils Act, 1926:—

(1) Substitute the following for the first paragraph of rule 28:—

"No advocate shall be a promoter of a trading company, nor shall he without the leave of the Bar Council otherwise engage in any trade or calling."

(2) Substitute the following for the existing rules 30 and 31:—

"30. Where monies are received from or on account of a client, the entries in the accounts shall contain a reference as to whether the amounts have been received for fees or out-fees and during the course of the proceedings, no advocate shall, except with the consent in writing of the client concerned, be at liberty to divert any portion of the out-fees towards fees.

31. (i) Where any amount is received from Court or from other parties on behalf of the client, the fact of such receipt must be intimated to the client as early as possible.

(ii) (*a*) After the termination of the proceeding the advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amounts paid or sent to him for out-fees or any amount that has come into his hands in that proceeding.

(*b*) Where the fee has been left unsettled, the advocate shall be entitled to deduct, out of any monies of the client remaining in his hands at the termination of the proceeding for which he had been engaged, the fee payable under the rules in force for the time being. The balance, if any, shall be refunded to the client.

(*c*) The advocate is under no obligation to appear for the client if the whole of the settled fee is not paid to him before the hearing of the case, provided that reasonable notice is given to the client that he will not appear for him unless his full fee is paid".—*Fort St. George Gazette, dated 9th May,* 1944. *Judicial Notifications.*